

STATE OF MICHIGAN
COURT OF APPEALS

VIRGINIA FINAZZO,

Plaintiff-Appellee,

v

LENORE SPEZIA,

Defendant-Appellant.

UNPUBLISHED
February 22, 2005

No. 250571
Macomb Probate Court
LC No. 02-171582-CZ

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals the trial court's judgment, pursuant to a jury verdict, that ordered defendant to return money taken from several bank accounts to her mother's estate, and we affirm.

I

Plaintiff Virginia Finazzo filed a complaint and alleged that defendant, Lenore Spezia, plaintiff's sister and the personal representative of their mother's estate, had breached her fiduciary duty and a constructive trust when defendant refused to turn over assets in certain bank accounts to decedent's estate. Plaintiff and defendant are both beneficiaries of the estate. The bank accounts at issue listed decedent and defendant as joint owners. Plaintiff alleged that decedent intended that all of her assets were to be part of the estate, which was to be divided equally between plaintiff and defendant, and that the contested bank accounts were titled jointly only to allow defendant to help decedent pay her bills. On the other hand, defendant asserted that though the accounts were titled jointly in part to allow her to help her with her mother's finances, this was also done because decedent did not want the money to go to her estate, but rather, decedent wanted defendant to have all of it.

II

Defendant asserts that the trial court abused its discretion when it denied her motion for new trial. We review the trial court's denial of a motion for new trial for an abuse of discretion. *Shuler v Mich Physicians Mut Liab Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004) (citation omitted). Under MCR 2.611(A)(1)(e) and (1)(g), a new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected and the verdict was against the great weight of the evidence or there was an error of law.

A

Defendant says that a new trial was warranted because the trial court abused its discretion when it excluded evidence pertaining to decedent's statements made after she re-titled several bank accounts to list defendant and decedent as joint owners with the right of survivorship. In particular, defendant maintains that the trial court erroneously excluded the testimony of one of her proposed witnesses, Demetrois Polyzois, the attorney who drafted decedent's will after decedent had re-titled the accounts in question. In the absence of fraud or undue influence, a deposit made in a jointly-owned account with the right of survivorship is prima facie evidence that the depositor intended title to the deposit to vest in the survivor of the account. MCL 487.703. However, "[t]his presumption can be rebutted by reasonably clear and persuasive proof to the contrary, i.e., by proof of the decedent's intent that title to the jointly held funds not vest in the survivor." *In re Cullmann Estate*, 169 Mich App 778, 786; 426 NW2d 811 (1988) (citation omitted).

Defendant concedes that statements made by decedent regarding decedent's state of mind when re-titling the bank accounts are inadmissible if made *after* the re-titling of the accounts. *In re Cullmann*, *supra* at 788-789, quoting *Pence v Wessels*, 320 Mich 195, 199-200; 30 NW 834 (1948). However, she argues that she should have been allowed to present Polyzois as a witness because he could also give testimony that would rebut plaintiff's allegation of undue influence. However, based on plaintiff's statement on the record that any allegation of undue influence had nothing to do with her claim regarding the jointly titled accounts, and the fact that any testimony from Polyzois would have concerned conversations with decedent occurring after the re-titling of the accounts in question, we conclude that the trial court was within its discretion in excluding this testimony. Moreover, the jury's ultimate decision was not based on a finding of undue influence. Therefore, we hold that defendant failed to prove that the exclusion of this testimony affected her rights and thus defendant's motion for a new trial was properly denied.¹

B

Defendant maintains that the jury's determination that decedent intended that the bank accounts be included in decedent's estate was against the great weight of the evidence. We review a trial court's denial of a motion for new trial based on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). "This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* (Internal citations omitted).

¹ Alternatively, defendant argues that a curative instruction was needed to explain Polyzois' absence. The record shows that the trial court agreed to give a special instruction, and defendant affirmatively accepted the instructions as given. A party who agrees to jury instructions as given is not entitled to appellate relief for any alleged instructional error. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591; 657 NW2d 804 (2002).

Plaintiff introduced testimony from many witnesses that decedent said, before mid-November 1997, when the accounts were re-titled, that the family money would be divided “50/50” between the parties. Defendant countered with her own testimony, and presented witness Patricia Witchner, who testified that decedent told her that she wanted defendant to have all of the money and to have defendant on the joint accounts. Given this conflicting testimony regarding decedent’s intent behind re-titling her accounts jointly with defendant, the jury chose to believe plaintiff’s witnesses rather than defendant’s. Such questions requiring assessment of the credibility of witnesses ordinarily should be left for the factfinder. *Shuler, supra* at 519. Furthermore, the jury could infer from this testimony that, because decedent intended to split the family money (which was contained in the bank accounts) between her daughters, she did not intend title to these accounts to vest in defendant. Therefore, we hold the trial court did not abuse its discretion by denying defendant’s motion for a new trial based on this argument.

C

Defendant also asserts that the trial court abused its discretion when it denied her motion for a new trial brought on the ground that the jury’s verdict was excessive and against the great weight of the evidence. Defendant’s essential argument is that rather than order the full amount of the funds held in the jointly titled accounts be returned to the estate, only half that amount (i.e., plaintiff’s portion) should be returned to the estate. By finding that decedent intended the bank accounts to be included in her estate, the jury determined that the bank accounts belong to the estate until such time as they are distributed according to the will. Therefore, we hold that the trial court did not abuse its discretion when it denied defendant’s motion for new trial based on this argument.²

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

² Defendant claims that the trial court abused its discretion when it denied her alternative request for remittitur. However, defendant has abandoned this issue by failing to address its merits. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003), citing *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Regardless, as we discussed above, the jury’s verdict ordering defendant to return the full amount of the bank accounts to decedent’s estate is consistent with its determination that decedent intended that the money be distributed through her estate according to her will.